No. 4122

United States

Circuit Court of Appeals

For The Ninth Circuit

THE MOHAWK RUBBER COMPANY OF NEW YORK, INC., a corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHERRILL, individually and as co-partners doing business under the firm name and style of MUNNELL & SHERRILL,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

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ASSIGNMENT OF ERRORS

I.

The evidence is insufficient to support the verdict and judgment entered thereon, in that there is no evidence that W. G. Fitzgerald had authority to

make and bind the plaintiff by the contracts set forth in the answer.

II.

The court erred in overruling plaintiff's motion for the direction of a verdict in its favor made at the close of the entire case, for the reason that plaintiff's causes of action were undisputed and there was no evidence in the record to establish the defenses set forth in defendants' answer, in that there was no evidence that W. G. Fitzgerald had authority to make and bind the plaintiff by the contracts set forth in the answer.

III.

The court erred in denying plaintiff's motion to set aside the verdict and judgment entered thereon and to grant a new trial, which motion was based upon the following grounds:

1. Misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter, after the court had repeatedly ruled that such matters were immaterial and not within the issues.

2. Insufficiency of the evidence to support the verdict and the judgment entered thereon.

STATEMENT OF THE CASE

Plaintiff is a manufacturer of automobile tires and tubes, known as Mohawk Tires, in Akron, Ohio. Defendants are retail merchants and jobbers in Portland, Oregon, selling, among other things, automobide tires and tire accessories. They began

to purchase merchandise from plaintiff early in 1919. In the fall of 1920 they were indebted to plaintiff in a sum upwards of $20,000.00, and to liquidate that indebtedness an arrangement was made in November, 1920, by which defendants were permitted to return merchandise amounting to approximately $6500.00, and the balance was paid by five promissory notes for $2633.36 each, payable respectively in February, March, April, May and June of 1921. After this adjustment was made in the fall of 1921, defendants bought new merchandise on open account amounting to $11,739.75.

Defendants paid two of the aforesaid five notes and paid on the open account in cash and by means of credits allowed the defendants, the sum of $5006.74, so that the defendants owed plaintiff the amount of three notes for $2633.36 each and the balance on the open account amounting to $6733.01, and this action was brought to recover these amounts.

Defendants admitted the execution and delivery of the notes described in the complaint and admitted the amount of the balance due on the open account. (Instructions, p. 521.)

The defenses to the four causes of action consist of three claims for credit, all based on agreements alleged to have been made by defendants with one W. G. Fitzgerald, plaintiff's agent.

One claim for credit is for $9814.20, less $1075.00 which defendants admitted at the trial they had

received, arises under the following circumstances: In September, 1921, the state of the account between plaintiff and defendants became such that they could no longer continue to do business together. Defendants were indebted to plaintiff in a large sum of money which was long past due and arrangements were made with one Cassidy, doing business as American Tire and Rubber Co., to handle plaintiff's line of tires in the Portland territory. There was no relationship of principal and agent between plaintiff and defendants or between plaintiff and Cassidy. In each case the relationship was merely that of buyer and seller. At the time the arrangement was made with Cassidy, Fitzgerald, who was Pacific Coast sales manager for plaintiff, also arranged with Cassidy and with defendants that Cassidy could draw on defendants for such tires as he needed and were satisfactory to him until the new stock ordered by Cassidy would arrive, and for such stock as Cassidy took from defendants he would be charged by plaintiff and defendants would be credited to that extent. This arrangement was evidenced by the letter of September 18, 1921 (Defendants' Ex. 7, p. 93), reading as follows:

"Munnell & Sherrill,

Portland, Oregon.

Dear Sirs:

This letter will be your authority to turn over to Geo. H. Cassidy, Prop. of the American Tire & Rubber Co. of your city, any Mohawk

tires or tubes that you have in stock at present and in any quantity and sizes that might be agreeable to yourselves and Geo. H. Cassidy, Prop. of the American Tire & Rubber Co.

Please furnish us with a list showing the serials, styles and types of any tires you might turn over to the other party, also furnish us with a list showing the red and grey tubes that might be transferred to the same party. Upon receipt of said lists and information, credit for the amounts will be issued to apply against your account.

Mohawk Rubber Co. Inc. of N. Y.
By W. G. Fitzgerald,
Pacific Coast Manager."

After Fitzgerald made the foregoing arrangements and left, defendants turned over to Cassidy a stock of tires amounting to $9814.20, out of which amount he retained $1075.00 worth and shipped the rest to plaintiff's San Francisco branch. Plaintiff refused to accept these tires, caused them to be stored for the account of defendants, and so notified them.

For the purpose of this review, plaintiff makes but one contention, namely, that Fitzgerald had no authority to make and bind it by the agreement which would enable defendants to return merchandise; to turn over merchandise to anyone else, or to relieve defendants from liability in any manner for the purchase price of merchandise; that there was

no evidence in the record of any express, implied or apparent authority on the part of Fitzgerald to make such a contract, and that on the contrary the evidence established affirmatively that defendants **knew** that Fitzgerald was a sales manager whose authority was limited to making sales only, and that they **knew** that he had no authority to make any agreements which would relieve defendants from liability for the merchandise purchased or agreements for credits of any kind whatsoever.

The knowledge on the part of the defendants of the limitations of Fitzgerald's authority referred to above was established by a large volume of documentary evidence which will be referred to in the argument.

The next claim for credit arises out of the following circumstances: In the fall of 1920 defendants were indebted to plaintiff in a large sum of money and were unable to meet the obligation. Defendants wanted plaintiff to accept the return of a large amount of merchandise to be credited against their account, which plaintiff declined to do. Considerable correspondence was had, which resulted in the plaintiff authorizing Fitzgerald to affect an adjustment with defendants which would permit them to return merchandise to the extent of about $6500.00, the balance of the account was to be settled by accepting the five promissory notes for the sum of $2633.36 each, referred to above, two of which were paid and three being the notes referred to in the complaint.

Defendants claim, however, that at the time this adjustment was made, Fitzgerald also agreed with them that if at any time thereafter, the price of tires should decline, that plaintiff would give defendants credit for the amount of the reduction in price upon all of the tires that they had on hand at the time of the adjustment, to-wit, November, 1920, no matter how long prior thereto the tires had been purchased, or as defendants call it, they had an agreement for "unlimited protection" against decline in price. Fitzgerald denied making any such agreement and insisted that the understanding in reference to rebates for decline in price was to the effect that defendants would receive a rebate for all merchandise purchased within sixty days prior to the date of the decline in price and to apply to such merchandise as was on hand and unsold at the time the decline in price was announced. This was the custom of the plaintiff known to defendants and the custom prevailing in the tire trade. (Munnell Xam. p. 434.) No memorandum of such an agreement was made at the time of the settlement, nor did defendants speak of such an agreement in any of the communications that they wrote to Fitzgerald or to the plaintiff.

At the time this adjustment was made (November, 1920) and when defendants claim that the agreement for rebate or "unlimited protection" was made, defendants had on hand about $35,000.00 worth of tires, practically all of which had been

purchased prior to March, 1920, and a great deal of it had been purchased more than a year prior to the date of the adjustment. (Munnell Xam. pp. 434-435; Sherrill Xam. pp. 197-198.)

The first decline in price that was announced by plaintiff thereafter was May 10, 1921. Defendants then sent a list of the entire stock (H. A. Auspach, defendants' bookkeeper, p. 387) of tires which they had on hand to plaintiff and demanded a rebate on the entire stock to the extent of the decline in price, and defendants' claim is, that Fitzgerald called upon them and that he agreed with them to cancel one note for $2633.36 in satisfaction of their claim for rebates, instead of figuring the amount of the rebate that they claimed upon the entire stock of tires. Defendants claim that this agreement to cancel the note was done pursuant to the agreement for "unlimited protection" made at the time of the November, 1920, adjustment.

Plaintiff's contention in this respect is, that even if Fitzgerald had made an agreement in November or December, 1920, to rebate or give "unlimited protection" on the entire stock on hand at that time, that plaintiff would not be bound thereby, because it was in excess of his authority, the limitation of which was known to the defendants; that even if Fitzgerald had made an agreement in May or June, 1921, to cancel a note in liquidation of that claim, that plaintiff would not be bound thereby because it was in excess of his authority, the limitation of which was known to defendants.

Both credits will be dealt with in the same argument of this brief, for the reason that they both involve the question of Fitzgerald's authority. The one involves the right of Fitzgerald to bind plaintiff by an agreement for the return of merchandise and the other involves the authority of Fitzgerald to make agreements for rebates and agreements to cancel notes, both of which agreements if made would amount to releasing defendants from liability for the price of merchandise sold and delivered.

Plaintiff also complains of the verdict and judgment entered thereon because of prejudicial misconduct on the part of counsel for defendants. In the opening statement to the jury and in several lengthy speeches during the trial defendants' trial counsel repeatedly brought to the attention of the jury the contention that the tires sold by plaintiff to defendants were of defective quality and that defendants suffered loss thereby, notwithstanding the fact that no such defense was interposed, notwithstanding the fact that it was foreign to any of the issues raised by the pleadings, notwithstanding the fact that plaintiff had repeatedly objected thereto and had specifically called to the attention of the court that such references were assigned as misconduct prejudicial to plaintiff, and notwithstanding the repeated rulings of the court that such references were wholly outside of the issues. That this misconduct resulted in a prejudicial atmosphere is made apparent by the fact that the jury rendered a verdict for the defendant and did not even allow the

plaintiff the balance which defendants in their pleadings admitted was due the plaintiff.

BRIEF OF ARGUMENT

I.

PLAINTIFF'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED. AT THE CLOSE OF THE ENTIRE CASE THERE WAS NO DISPUTE AS TO PLAINTIFF'S CAUSES OF ACTION AND DEFENDANTS HAD FAILED TO ESTABLISH ANY OF THE AFFIRMATIVE DEFENSES OR COUNTER-CLAIMS SET FORTH IN THE ANSWER. THE DEFENSES AND COUNTER-CLAIMS WERE BASED UPON AGREEMENTS ALLEGED TO HAVE BEEN MADE WITH PLAINTIFF'S AGENT. THE RECORD ESTABLISHED THAT DEFENDANTS KNEW OF THE LIMITATIONS OF THE AGENT'S AUTHORITY, HENCE THERE COULD BE NO RECOVERY UPON ANY AGREEMENT MADE WITH THE AGENT, EXCEPT UPON PROOF OF **EXPRESS AUTHORITY.** THERE COULD BE NO RECOVERY UPON THE THEORY OF IMPLIED OR APPARENT AUTHORITY. DEFENDANTS HAD FAILED TO ESTABLISH ANY EXPRESS AUTHORITY, NOR WAS THERE ANY EVIDENCE OF IMPLIED OR APPARENT AUTHORITY TO MAKE THE CONTRACTS RELIED UPON BY DEFENDANTS.

Instructions of the Trial Court, pages 524-525-526;

Slocum vs. N. Y. Life Ins. Co., 228 U. S. 364;
Salene vs. Queen City Ins. Co., 59 Or. 297, 116 Pac. 1114;
Ladd vs. Aetna Ind. Co., 128 Fed. 300;
Wentworth vs. Winton Co., 95 Or. 541; 188 Pac. 204;
Leavitt vs. Dimmick, 86 Or. 278; 168 Pac. 292;
Long Creek Bldg. Assn. vs. State Ins. Co., 29 Or. 569. 46 Pac. 366;
2 Corpus Juris, 964;
Aetna Ind. Co. vs. Ladd, 135 Fed. (Ninth Circuit) 636-644;
Keane vs. Pittsburgh Lead Mining Co., 105 Pac. 60-64.

II.

THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED, ON ACCOUNT OF THE MISCONDUCT OF DEFENDANTS' COUNSEL IN REPEATEDLY BRINGING TO THE ATTENTION OF THE JURY THE CLAIM THAT THE MERCHANDISE SOLD BY PLAINTIFF TO DEFENDANTS WAS OF DEFECTIVE QUALITY AND THAT DEFENDANTS SUFFERED LOSS THEREFROM, NOTWITHSTANDING THE FACT THAT NO SUCH DEFENSE WAS INTERPOSED, THAT IT WAS FOREIGN TO ANY ISSUE RAISED BY THE PLEADINGS, NOTWITHSTANDING OBJECTIONS OF PLAINTIFF TO SUCH REFERENCES, THE REPEATED ANNOUNCEMENT OF PLAINTIFF

THAT SUCH REFERENCES WOULD BE ASSIGNED AS MISCONDUCT, AND THE REPEATED RULINGS OF THE TRIAL COURT THAT SUCH MATTERS WERE NOT WITHIN THE ISSUES.

Chicago City R. R. Co. vs. Gregory, 6 A. & E. Ann. Cas. 221-223; 221 Ill. 591;

Louisville R. R. Co. vs. Payne, 19 A. & E. Ann. Cas. 294;

Cleveland R. R. Co. vs. Pritschaw, 100 A. S. R. 682-687;

People vs. Derbert, 71 Pac. 464;

Chicago R. R. Co. vs. Mines, 77 N.E. 898;

Notes following the case in 6 A. & E. Ann. Cas. 224;

Notes following the case in 19 A. & E. Ann. Cas. 296;

Notes following the case in A. & E. Ann. Cas. 1917 A 441;

People vs. Mullings, 83 Cal. 138; 23 Pac. 229.

III.

THE JUDGMENT SHOULD BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF.

ARGUMENT

I.

With respect to the scope of Fitzgerald's authority the court instructed the jury as follows:

"But it is equally well settled that one who deals with an agent **knowing** that he is clothed

with a **circumscribed** authority and that his act transcends his authority cannot hold his principal, and this is true whether the agent is general or special, for a principal may limit the authority of one as well as the other. So that, while Mr. Fitzgerald was the Pacific Coast manager of the plaintiff, and while parties dealing with him **without** any **knowledge** of the limitation on his authority had a right to assume that he possessed the authority usually exercised by persons occupying such positions, and if they did so relying on his apparent authority, his acts would be binding upon his principal. But if, in dealing with Fitzgerald, these defendants **knew** that he was exceeding his authority or that he **had no authority to make the particular contract** alleged to have been made, then such agreement would not be binding upon the plaintiff, for one dealing with an agent whose authority is known to be special or limited deals at his peril. And, **if** you find from the evidence that the **defendants knew or should have known** the conditions that existed, **that the authority of Fitzgerald was limited,** the plaintiff will not be bound by any agreement or promises alleged to have been made by him contrary to and in disregard of such limitation, even if you should find that he did make them, unless you also find that plaintiff had given him **express authority to make such arrangement.**" (Trans. pp. 525-526.)

The law announced in the foregoing instruction is supported by the following authorities:

In Slocum vs. N. Y. Life Ins. Co., 228 U. S. 364:

> "One who deals with an agent knowing that he is clothed with a **circumscribed** authority and that his act transcends his power cannot hold his principal, and this is true whether the agent is a general or a special one, for a prinsipal may limit the authority of one as well as of the other."

In Salene vs. Queen City Ins. Co., 59 Ore. 297, 116 Pac. 1114:

> "It is contended that inasmuch as Rowland was the local agent of the defendant, it was bound by his acts within the scope of his **real** or **apparent** authority; but it is equally true that if one dealing with an agent assuming to act for his principal, and at the time **knows the limitations** of the agent's authority, the former takes nothing by any act of the agent in excess of that authority."

The foregoing instruction represents the law of the case. The crucial element involved in this proposition of law is the **knowledge or lack of knowledge** of defendants as to any limitation on Fitzgerald's authority. If they knew that his authority was limited (notwithstanding the title of Pacific Coast manager) they could only recover upon proof of **express authority** to make the particular agreements set forth in their answer. There was no at-

tempt made to establish any express authority to make those agreements, hence the only question involved is whether defendants had knowledge of the limitations of Fitzgerald's authority.

To create an issue of fact under this instruction there had to be some substantial evidence tending to show lack of knowledge of the limitation of Fitzgerald's authority, and the record is barren of such evidence.

The fact that Fitzgerald's title was "Pacific Coast manager" does not determine the scope of his authority, for as was said in Ladd vs. Aetna Indemnity Co., 128 Fed. 300:

> "The extent of the agent's authority is not determined from the name used to designate the agency. That must be ascertained from the scope and character of the business which the agent is empowered to transact."

It is admitted that Fitzgerald was plaintiff's agent. The question involved here is whether the agreements which defendants claim they made with Fitzgerald were within the scope of his authority. Plaintiff's contention is that defendants knew that Fitzgerald's authority was limited, hence defendants could make no agreements with Fitzgerald relying upon any implied or apparent authority, but could make only such agreements with him as were expressly authorized, and there being no evidence of any express authority at the close of the entire case, plaintiff's motion for a directed verdict should have been granted.

We respectfully submit that the question as to whether Fitzgerald had authority to make the agreements claimed to have been made **should have been disposed of as a question of law on plaintiff's motion for a directed verdict,** and not submitted to the jury as an issue of fact. There was no question of Fitzgerald's agency; that was admitted. The **only question** that presented itself was as to the **scope** of his authority **upon the record** presented to the court. The law is almost universal that the question of the existence of the agency is one of fact, while the question as to the scope of the agency is one of law.

In Long Creek Bldg. Assn. vs. State Insurance Co., 29 Ore. 569, Justice Robert Bean, then on the Supreme Court Bench of the State of Oregon, held:

> "While the existence of an agency is always a question of fact, what may be lawfully done thereunder is a **question of law.** Glenn vs. Savage, 14 Ore. 567, 13 Pac. 442."

In 2 C. J. 964, the rule is laid down as follows:

> "Whether there is any competent evidence to establish the extent of the authority is a question of law for the court, and it has been held that such question should be disposed of by the court alone and should not be submitted to the jury where there is no competent evidence, or where it is clear and undisputed, or manifestly insufficient to prove the authority, **or where the facts relating to the authority are**

undisputed and are such that reasonable minds could draw only one conclusion therefrom."

And this text is supported by a long line of decisions in almost every state of the Union, including the State of Oregon.

The record in this case comes squarely within the rule announced above, for there is no evidence of any kind to offset or diminish the effect of the notice which the documentary evidence conveyed to the defendants as to Fitzgerald's lack of authority.

The question as to the scope of an agent's authority, is one of fact only, when the testimony is conflicting upon the facts from which knowledge of the lack of authority must be inferred, but where there is no issue as to the facts from which knowledge must be charged to the defendants, the question is one of law, and upon this record we most respectfully submit that it was incumbent upon the court to direct a verdict for the plaintiff, for there was no issue of fact as to the knowledge of defendants of Fitzgerald's lack of authority.

DOCUMENTARY EVIDENCE ESTABLISHING CONCLUSIVELY THAT DEFENDANTS KNEW THAT FITZGERALD HAD NO AUTHORITY TO MAKE THE AGREEMENTS WHICH THEY CLAIM TO HAVE MADE WITH HIM.

Defendants' Exhibit 1 (p. 57) is a telegram dated November 24, 1920, from Mohawk Rubber Co. to Fitzgerald, which specially authorized him to conclude a settlement made in November, 1920. No

mention of any agreement for rebates is contained therein. This telegram was presented by Fitzgerald to defendants and left with them at the time that settlement was made, so that they knew at that time that the adjustment was being made pursuant to express authority. The telegram is as follows:

> "Munnell and Sherrill make a complete settlement along lines your letters 19th have all tires returned San Francisco branch get notes for balance including interest since due seven per cent."

Defendants' Exhibit 3 (p. 70) is a letter of May 10, 1921, by plaintiff to defendants announcing the May, 1921, decline in price. In it plaintiff states to defendants:

> "Prices will be adjusted back to May 2nd, and price guarantee will cover goods on hand and unsold, bought during March and April, also unsold portion of dating orders.
>
> Yours very truly,
>
> The Mohawk Rubber Company,
>
> M. E. Mason,
>
> Sales Manager."

This communication brought home knowledge to defendants that rebates would be allowed only on merchandise purchased during March and April, 1921. Nevertheless defendants insist that Fitzgerald agreed to cancel a note to cover rebates on merchandise that was purchased prior to March, 1920, more than a year prior to the decline in price, and it must be presumed that defendants knew that

Fitzgerald could make no binding agreement, even if he had done so, that would be contrary to the express announcement in the foregoing letter.

Defendants' Exhibit 3 (p. 71) is a circular letter which accompanied the foregoing letter and in it plaintiff again said:

> "Our protection is on goods bought during March and April at regular prices and which are on hand and unsold on May 2nd."

Defendants' Exhibit 5 (p. 81) is a letter from Fitzgerald to defendants dated June 2, 1921. He had received a letter from defendants enclosing their list of tires upon which they claimed a rebate by reason of the May, 1921, decline. In this letter Fitzgerald says:

> "In looking over the list and noting various sizes, quantities and etc., we presume that you must have listed every tire you and your dealers have in stock and of course you understand that we cannot rebate on stock regardless of the date it was purchased, there has to be a limit to the protection of distributors on price, otherwise the manufacturer would not stay in business very long.
>
> Send us immediately the serials covering stock mentioned on the list and we will trace them back and find out when shipment was made and those that come within the time limit will be referred to our invoice department and a credit issued for the differential."

The foregoing letter indicates clearly that Fitz-

gerald was keeping within the announcement of his company that rebates would be allowed only for the purchases made within sixty days prior to the May, 1921, decline, and that he did not know of any agreement to allow rebates for any merchandise purchased prior to that date, and indicates also that he was keeping clearly within the limit of his authority.

Plaintiff's Exhibit "F" (p. 117) is a letter from plaintiff to defendants dated June 18, 1919, written at the time that plaintiff began to do business with defendants. While the negotiations for the commencement of business were carried on between Fitzgerald and the defendants, yet the actual agreement was made by Mr. Mason, representing the plaintiff, indicating that Fitzgerald was **authorized to negotiate but not to close contracts.**

Plaintiff's Exhibit "J" (p. 129) is a letter from Fitzgerald to Munnell & Sherrill dated March 9, 1920. This letted was written by Fitzgerald in response to a letter from defendants to put through an order at an old price after new prices had been announced, and in reply Fitzgerald wrote defendants:

> "We received advice from the factory the latter part of last week, **instructing us** not to accept any more orders on the basis of the old price.
>
> . . . . . .
>
> "We trust that we are correct in regard to your order and upon its receipt duly signed by

the original purchaser, we will relay same to the factory and endeavor to have it put thru at the old price."

Thus bringing to the attention of defendants that their request had to be relayed by Fitzgerald to the **Home Office** for action and that he had no authority to bind plaintiff by an agreement such as defendants desired.

Plaintiff's Exhibit "K" (p. 131) is a letter from Fitzgerald to Munnell & Sherrill, dated March 15, 1920, referring to the same matter as in the preceding letter, and in it Fitzgerald tells defendants that his willingness to accept the $10,000.00 order at the old price was

"without the authority of the factory,"

and after telling them that he sent the order to the factory, he said:

"We can offer you no hopes as to it being accepted by the factory.

. . . . . .

We are today writing Mr. Mason, **laying all the facts** concerning the Miles and Clark order **before him** and are requesting him to wire you his decision in the matter."

. . . . . .

"We are giving the factory this information, and they will handle the matter accordingly."

Plaintiff's Exhibit "L" (p: 136) is a letter from Munnell & Sherrill to Fitzgerald dated March 19, 1920. It deals with the same subject involved in the two preceding letters, in which defendants state:

"Now, Fitz, we are leaving this in your hands, and expect you to go to bat for us, as mentioned before. Unless we do not receive some assistance from the factory, we are out of luck, as Miles & Clark have already drawn 21 32x4 from our stock, which was all we had left, and we have given them our word that we would take care of them for enough Cords to equip their 35 cars. Unless we get these out of the factory, we are going to be forced to sell them at a loss, as we have no intention of going back on our word with them."

Defendants' request to Fitzgerald that "he go to bat for us" indicates clearly that defendants knew that Fitzgerald's position was that of an intermediary merely; that he had no authority to grant them their request and that all he could do was to use his influence with his principal.

Plaintiff's Exhibit "M" (p. 139) is a letter from Fitzgerald to Munnell & Sherrill dated March 23, 1920. In it Fitzgerald says to defendants:

"You probably know that the **writer handles** the **territory** strictly in **accordance** with **the rules** and policies **outlined to him** by the **factory** and in **cases where considerable money is involved it is necessary** for him to confer **with the factory** before committing himself."

. . . . . .

"We could not give you definite information on the Miles and Clark order, however, until we

had explained the circumstances to the factory, and we were doubtful if they would accept this order on the old basis. However, they wired us last Saturday stating that they would accept one hundred and seventy-five (175) cords on Miles and Clark's order at the old price and also protect you to the extent of the Broadway store order."

Here we have direct communication to defendants to the effect that Fitzgerald acts only upon express instructions from the factory.

Plaintiff's Exhibit "Q" (p. 146) is a letter from Fitzgerald to Munnell & Sherrill dated June 30, 1920, in response to defendants' request for an extension of time for payment, or that plaintiff take back part of their stock of tires. Fitzgerald wrote:

"We note that you would dislike sending the tires back to the factory, but would be forced to do this in case you were not given sufficient time in which to dispose of them. We are today writing the factory and also are enclosing your letter and you will hear from them within the next ten days. The writer is unable to give you definite information on the subject of extensions as this is beyond his authority. However, as mentioned above, we are taking the matter up with the factory and feel sure that they will be inclined to help you in every way within reason."

The foregoing letter deals with the subject of extension of time and return of merchandise and

Fitzgerald informs defendants definitely that these matters are beyond his authority. With such information before it, defendants cannot be heard to say that there is any issue as to their knowledge or lack of knowledge with respect to Fitzgerald's authority.

Plaintiff's Exhibit "R" (p. 148) is a letter from the plaintiff's **Home Office** to defendants dated April 5, 1920, in which plaintiff said to defendants:

> "We telegraphed Mr. Fitzgerald that he might make you certain concessions. We did this largely in view of the conditions as explained to us."

This communication conveys knowledge to defendants that the right to make concessions comes by express direction from his principal.

Plaintiff's Exhibit "S" (p. 150) is a letter from Fitzgerald to defendants dated July 2, 1920, in which he says:

> "In regard to helping you out on your payments with extensions, as we advised you several days ago this matter has been taken up with the factory and you will hear from them within the next several days. We have every reason to believe that they will be willing to help you out in every reasonable manner, as you have so far handled your obligations satisfactorily and the company will not overlook the fact."

Plaintiff's Exhibit "T" (p. 154) is a letter dated

July 8, 1920, from plaintiff's **Home Office** to defendants:

> "We have received your letter of June 29th, and our San Francisco branch has also referred to us the letter which you addressed to them on June 26th."

. . . . . .

After outlining a plan of settlement, plaintiff then says:

> "We are writing our San Francisco branch to make out these notes and forward them to you, as the account is handled on their books.
>
> If the terms which we are outlining are not satisfactory, we shall be willing to alter them in order to co-operate with you."

From this letter it is again apparent that Fitzgerald has not the authority to conclude any adjustment, other than expressly authorized by his principal, and that he is merely used for the purpose of negotiating.

Plaintiff's Exhibit "U" (p. 156) is a letter from Fitzgerald to defendants, in which he says:

> "We note copy of a letter written your company under date of July 8th by our Mr. B. J. Brooks, credit manager at Akron, Ohio, which has reference to your unpaid account.
>
> Mr. Brooks has requested that we go over this carefully and send you two acceptances covering this unpaid balance, same maturing August tenth and September tenth. We are,

therefore, enclosing two acceptances in the amount of $4,908.17 each."

Here again we have an indication that Fitzgerald is merely a "go-between" and is merely carrying out the express directions coming from the Akron Home Office.

Plaintiff's Exhibit "V" (p. 157) is a telegram dated October 27, 1920, from defendants to plaintiff's **Home Office,** in which they say:

"Account returns from dealers would prefer to return some stock to Frisco if agreeable."

Again indicating that they knew that permission to return stock must be obtained from the principal and not from Fitzgerald.

Plaintiff's Exhibit "Y" (p. 163) is a letter dated October 21, 1920, from the plaintiff's **Home Office** (Mr. Mason) to defendants, in which plaintiff says:

"Through a letter received from Mr. Fitzgerald this morning he states that you are worried over a price change which is slated to take place November 1st.

. . . . . .

"So far as price guarantee is concerned we have always protected on **goods on hand, unsold and purchased within sixty days of a price change.** Whether or not we will continue depends entirely upon what the Federal Trade Board decides as to the practice in several lines of merchandise."

This letter was received about a month prior to the November, 1920, settlement and sets forth the company's position with respect to protection against decline in prices, and points out clearly that protection will only be given on goods "on hand and unsold, purchased within sixty days of a price change. With this information before it, even if Fitzgerald had made an agreement for unlimited protection, it would be clear that it was beyond the scope of his authority, because the plaintiff had notified defendants that their protection would be limited to purchases made within sixty days of the decline and which were on hand and unsold at the time the decline was announced. It is elementary law that the agent could make no more far-reaching agreement than the known limitations fixed by the principal, and yet, notwithstanding that they had knowledge from the principal that they would only be protected on merchandise purchased within sixty days of the decline in price, defendants insist that Fitzgerald made an agreement for unlimited protection, but if he did they knew then that he could make no such agreement.

Plaintiff's Exhibit "BB" (p. 174) is a letter from Fitzgerald to Munnell & Sherrill dated November 1, 1920, in response to defendants' request for leave to return merchandise. Fitzgerald says:

> "You probably know that we do not accept returned goods to offset current accounts or obligations incurred on the basis of a straight sale. We are always glad to help out our dis-

tributors by exchanging sizes for those that are moving more rapidly and in some instances a charge of 5 per cent is made for rehandling and so forth. It is too bad that you did not know exactly what you wanted to do when the writer was last in Portland, then this matter could have been settled one way or the other, **as it is necessary for such things to be referred to the factory** and this requires time.

If you desire immediate action on this matter our suggestion is that you send us a list of what you wish to return and upon its receipt it will be **relayed on to our factory and they will write you direct, giving their disposition in the matter.**"

Here again, as late as November 1, 1920, Fitzgerald informs defendants that the matter of returning merchandise must be referred to the factory, conveying clearly the information that he had no authority to deal with that subject.

Plaintiff's Exhibit "FF" (p. 178) is a letter dated November 4, 1920, from defendants to plaintiff's **Home Office,** in which they say:

". . . After taking up the matter with Mr. Fitzgerald again, and receiving nothing definite, got in touch with him by long distance, and told him that we wanted to do something immediately regarding our stock, and he promised he would let us know something definite just as soon as he could get word to the factory."

In this letter we have defendants' acknowledge-

ment that Fitzgerald had informed them that he had to refer their requests to the factory.

Plaintiff's Exhibit "GG" (p. 180) is a letter dated November 4, 1920, from defendants to Fitzgerald, in which they say:

> "We are **writing the factory** today regarding the disposition of these tires, and trust that we will receive something definite from them within the next few days."

In this letter we have defendants' acknowledgement that they knew that they had to deal with the factory in connection with such matters as are here under consideration.

Plaintiff's Exhibit "II" (p. 183) is a telegram dated November 9, 1920, from plaintiff's **Home Office** to defendants, in which they say:

> "We have no intention of allowing return of your entire stock and letter written by Frisco does not indicate any such agreement."

Plaintiff's Exhibit "JJ" (p. 184) is a letter from plaintiff's **Home Office** to defendants, dated November 9, 1920, in which they say:

> "We haven't the slightest intention of letting any customer dump his entire stock upon us and ship his entire burden to us."

After plaintiff had notified defendants that they would not permit a customer to dump his entire stock upon them, Fitzgerald certainly could make no agreement which went beyond the plaintiff's announcement, unless specifically authorized to do so.

Plaintiff's Exhibit "KK" (p. 188) is a letter dated

November 10, 1920, from Fitzgerald to defendants, in which he says:

> "We have told you that the matter of you **returning stock** for credit, that is to offset your **debits, is entirely up to the credit department** at Akron, and we believe they have written you on the subject.
>
> You must not forget that the writer's authority with this company **is limited** to certain matters, such as the selling of goods, territorial arrangements, etc., but when it comes to **credits, return of unsold merchandise and things of that caliber, then you are dealing with our credit department,** because **after we have made a sale of goods then the matter passes out of our hands into those of the credit department at Akron,** and **we have no authority to take action on matters pertaining to their department.**"

. . . . . .

This letter being dated November 10, 1920, in San Francisco, was received in Portland a day or two later, or approximately two or three weeks before the November, 1920, adjustment was made, and advises explicitly as to what authority Fitzgerald possesses and to what extent his authority is limited . In the face of this information defendants could make no agreement with Fitzgerald, which would be binding upon the plaintiff, giving defendants unlimited protection. Nor could they make an agreement with Fitzgerald which would result in the return of practically their entire stock of mer-

chandise to the plaintiff. In the face of this letter defendants cannot be heard to say that there was any issue of fact as to the knowledge or lack of knowledge as to the scope of Fitzgerald's authority.

In the same letter Fitzgerald says to defendants:

> "Write to our factory and tell them what you want in the way of extensions. If they are reasonable, then you can rest assured the request will be given favorable consideration. They do not expect you to do the impossible, they only feel that you should bear your part of the burden and in the meantime do everything within your power to reduce your stock along legitimate lines."

In this statement we have summed up the position which Fitzgerald assumed in his negotiations with defendants and shows clearly that he was undertaking to act as an intermediary, making suggestions merely and using his best endeavors to obtain favorable concessions for defendants, but throughout all of that he took precautions to advise defendants clearly that he was in no position to make agreements for his company.

Plaintiff's Exhibit "RR" (p. 209) is a letter dated February 5, 1921, from Fitzgerald to defendants. In answer to the requests of defendants that he accept Liberty Bonds at face value instead of at market value on account of their indebtedness to the plaintiff, Fitzgerald wrote:

> "Regarding your recent offer to turn over to us a number of Liberty Bonds we beg to ad-

vise that we took this matter up with the factory and are this morning in receipt of a letter from them stating that they could only agree to take these bonds at market value, which would really be not better than you could sell same thru your local bank."

Plaintiff's Exhibit "SS" (p. 210) is a letter dated February 9, 1921, from defendants to Fitzgerald, in which they say to him:

"If the factory can find a way to realize on these bonds at face value, we will be glad to turn them over to apply on account, at any time."

Plaintiff's Exhibit "TT" (p. 211) is a letter from Fitzgerald to defendants, dated February 11, 1921, in which he says:

"As for being able to take these Liberty Bonds in the future, we will have to submit your letter to our Eastern office and if they have any suggestions we are asking them to writ to you."

Plaintiff's Exhibit "UU" (p. 212) is a letter dated February 11, 1921, from defendants to Fitzgerald, in which they say:

"We have not written the factory direct, as we wanted you to add your comments to this letter, knowing as you do what we have been up against this winter. Trusting they will appreciate our position, we are, etc."

Plaintiff's Exhibit "VV" (p. 213) is a letter dated February 17, 1921, from defendants to Fitzgerald, in which, among other things, they say:

"If you have not already done so, I wish you would again take up the matter of Liberty Bonds with the factory and see if they cannot take at least part of what we have."

Plaintiff's Exhibit "WW" (p. 217) is a letter from the **Home Office** to Munnell & Sherrill, dated February 21, 1921, in which plaintiff says:

"We are surprise to have you think that we could accept Liberty Bonds at par value."

Plaintiff's Exhibit "XX" (p. 219) is a letter dated February 23, 1921, from Fitzgerald to defendants, in which he says:

"We note what you say in reference to your Liberty Bonds and your inability to take care of your recent note. We have again taken this matter up with the factory and it is possible that we will hear from them the early part of this week. Just as soon as we do we will communicate with you further."

All of the foregoing letters dealing with the subject of Liberty Bonds and several others in the record dealing with the same subject, show clearly that Fitzgerald advised defendants that he had no authority to accept them at par value and that defendants would have to take that matter up with the factory or home office, which alone could pass on that question, and again calling to their attention the limitation on Fitzgerald's authority.

These letters also confirm the position which Fitzgerald assumed in his negotiations with defend-

ants, for throughout this correspondence defendants called upon Fitzgerald to take the matter up with the Home Office for the purpose of inducing them to accept the Liberty Bonds at par value, indicating that they recognized his position as an intermediary and knew of his inability to act on his own judgment.

Defendants' Exhibit 27 (p. 305) is a letter dated November 13, 1921, from defendants to plaintiff's **Home Office** and was directed to the attention of Mr. Mason. In it they say, among other things:

> "We regret exceedingly if Mr. Fitzgerald has exceeded his authority in this matter."

Again indicating that the lack of Fitzgerald's authority had been called to their attention.

There is no dispute as to the receipt of any of these letters or communications and the information contained therein is, of course, chargeable to the defendants. How can it be said then, that defendants did not know that Fitzgerald's authority was not limited. We submit that there is not a scintilla of evidence which would create an issue of fact upon that subject.

RESUME' OF PLAINTIFF'S **ORAL** EVIDENCE AS TO THE **SCOPE** OF FITZGERALD'S AUTHORITY AND AS TO THE KNOWLEDGE OF THE DEFENDANTS IN RESPECT THERETO.

MORRIS E. MASON, President and Sales Manager (p. 40) of the plaintiff company, testified that

he has the authority and control of the sales and distribution of plaintiff's products and that the duty to make agreements covering sales and distribution is granted to no other party **"except on authority from me."** (p. 41.)

> "Mr. Fitzgerald is manager of our San Francisco branch. He has authority to conduct the routine business of the branch, operating at all times subject to the orders of this office. He has no authority to enter into agreements, contracts or leases, which are not especially approved by the home office at Akron. He has no authority to draw upon the company funds except for small or minor expenditures."
>
> Q. 20. Was the agreement with W. G. Fitzgerald oral or in writing with respect to the scope of his authority? . . .
>
> A. 20. Oral. Mr. Fitzgerald has received no complete, definite, written instructions covering all of his duties. At the time he took charge of the San Francisco branch, which was May 1st, 1919, he spent some time in the office at Akron, Ohio, receiving instructions as to his duty and authority in connection with his management of the branch. Such oral instructions have been supplemented from time to time by letters covering some specific instance or question. In these oral instructions he was told that he had no authority to sign or bind this company on leases or contracts of any nature. That all such

agreements must be subject to my approval at Akron, Ohio. This included all special agreements, written or otherwise, covering the assignment of any territory other than an individual city, where special distributors' prices or special terms of any kind not enjoyed by regular dealers' trade were given.

Q. 21. Was W. G. Fitzgerald ever authorized to make contracts with purchasers of tires, either as retailers or jobbers, or in any other capacity, giving them unlimited protection against declines in prices?

A. 21. Absolutely not.

Q. 22. Was W. G. Filtzgerald ever authorized to make an agreement with defendants in September, 1921, or at any other time, by which the defendants would have the right to turn over their entire stock of tires to the plaintiff or its agents and receive credit therefor?

A. 22. No.

. . . . . .

Q. 25. Was W. G. Fitzgerald ever authorized to enter into an agreement with defendants by which they could turn over the whole or any part of their stock of tires to the American Tire & Rubber Co. and receive credit therefor from plaintiff?

A. No." (p. 461.)

W. G. FITZGERALD denied that he made the agreements claimed by defendants and emphatically insisted that he had no authority to make such

agreements and that he so informed defendants. His testimony in this connection is as follows:

On cross examination he testified: (p. 53.)

"Q. Now you had authority from the factory to take these tires back, didn't you?

A. Yes, sir.

Q. Did you get authority from the factory in reference to this transaction? (Referring to the November, 1920, settlement in which defendants were permitted to return about $6000.00 worth of tires and to pay the balance due by five notes.)

A. On this particular transaction of $6000.

Q. Yes.

A. Yes, sir.

Q. It wasn't necessary, was it?

A. Yes, sir.

Q. Wherein was it necessary?

A. Because I hadn't authority to allow anybody to return goods.

Q. You are the Pacific Coast manager?

A. I am.

Q. You handle the entire Pacific Coast on behalf of the Mohawk Rubber Co.?

A. The selling end."

The November, 1920, settlement was made by Fitzgerald pursuant to authority from the home office, shown by the telegram of November 24th, 1920, Defendants' Exhibit 1. (p. 57.) This telegram was left by Fitzgerald with defendants when he made the November, 1920, settlement (p. 55) and

indicates that Fitzgerald was making the arrangements by express authority from the plaintiff and that defendants knew it. On direct examination Fitzgerald testified (pp. 470-472):

Q. Who gave you your instructions or your authority?

A. Mr. M. E. Mason, our Sales Manager.

Q. At Akron, Ohio?

A. Yes, sir.

Q. What was the authority conferred on you in this business?

A. Well the only authority that myself or any manager of the Mohawk Company possesses, outside of Mr. Mason, is to go out and sell goods. We have prices to sell this merchandise at, and if there is anything—any special arrangements to be made outside of regular, we have to take these things up first with Mr. Mason before we can act.

Q. Does Mr. Mason fix the prices at which you can sell?

A. Well I don't know whether Mr. Mason himself fixes them, but our instructions come from Mr. Mason.

Q. You are furnished with prices at which you are to sell?

A. Yes, sir.

Q. And have you any authority to deviate from these prices?

A. Not the slightest.

Q. Who furnishes you with the terms of sale?

A. Mr. Mason.

Q. Now was there ever any authority granted to you to release payment of notes?

A. No, sir.

Q. Or to grant credits?

A. No, sir.

Q. Who did that in the management of the business?

A. Well, when we began to do business with Munnell & Sherrill our credit department at that time was in charge of a gentleman by the name of Fisk.

Q. I don't mean the name of the person; but what part of this institution handles these matters?

A. The Credit Department at Akron.

Q. At Akron, Ohio?

A. Yes, sir.

Q. As I understand it, your authority in respect to this business is that of sales?

A. Strictly.

Q. Except such special instructions as you may get to do any particular thing?

A. Yes, sir.

Q. When you made these calls upon Munnell & Sherrill during 1920, you say that was in your capacity as salesman for the Pacific Coast?

A. Yes, sir.

Q. Now on those occasions did either Mr. Munnell or Mr. Sherrill request any accommodations from you in the way of privileges of returning merchandise?

A. Yes, sir.

Q. Or credits or things of that sort?

A. Yes, sir.

Q. How often?

A. Well, I couldn't say how often, but in each instance I told them I would take the matter up with our factory and see what I could do.

Q. Did you ever give him permission or grant his request on the spot?

A. No, sir.

Q. Without taking them up with the factory and obtaining specific directions therefor?

A. No, sir, I did not.

Q. Did you ever state to Mr. Munnell or Mr. Sherrill on these occasions whether you had or had not authority to do the things that were requested of you?

A. Well, I think Mr. Munnell and Mr. Sherrill generally understood that my authority was limited.

Q. Did you ever say that to them?

A. I have; I have told them that.

Q. What did you tell them in that respect?

A. Well, in each instance where they asked for something that was beyond my authority, why I have explained to them that I had no

right to do this or do that, but I would have to take it up with the factory.

Q. As I understand it, you were frequently using your endeavor to obtain from the factory favorable consideration of their requests?

A. In every instance.

. . . . . .

(p. 473.)

Q. And when you came here what disposition was made of their account?

A. Well, when I came it was agreed—after I got authority from my factory—to allow them to return a sum of goods amounting to about $6500, if I am not mistaken, and that that $6500 worth of merchandise which they returned and the notes which they gave us a few days afterwards, which were mailed to us—that took care of their account to date, as far as I know.

(Trans. p. 480.)

Q. Did you agree with them at that interview that a note would be cancelled?

A. No, I did not.

Q. What did you say to them about that?

A. I told them that I would take the matter up with the factory and endeavor to have one of them cancelled.

Q. Did the factory ever permit that to be done?

A. They did not.

(Trans. p. 481.)

Q. Had you received any—up to that time,

up to this interview of June 18th, had you received any instructions from the home office authorizing you to agree to a cancellation of any of the notes?

A. I did not.

Q. Or to vary from the terms of the rebate as set forth in the announcement of May 10th?

A. No, sir.

(Trans. p. 491.)

Q. Had you been authorized by the Mohawk Company to make any arrangement which would result in these tires coming back to them?

A. I had not.

(Trans. p. 495.)

A. . . . Now I had no authority to tell Munnell & Sherrill, or neither did I tell them, that when they gave me those notes, or sent those notes in to our factory, that these goods would just automatically revert in their purchase, don't you see, on the Spring dating terms. I didn't tell them that, I couldn't have told them that.

(Trans. p. 508.)

A. Well, I have authority to make—to sell merchandise, to make territorial arrangements, to hire salesmen, and to conduct the selling end of our business.

RESUME' OF DEFENDANTS ORAL TESTIMONY AS TO KNOWLEDGE OF THE LIMITATION OF FITZGERALD'S AUTHORITY.

Sherrill's testimony (pp. 122-123):

"Q. Mr. Sherrill, I want you to stick to the incident I am talking about. We will come to the other later. I am talking about the time when you requested Mr. Fitzgerald to take back the $10,000 worth of tires, the tires that were shipped to enable you to fill that order, and when you found you couldn't fill it, you requested him to take that stuff back. Didn't he tell you then that he couldn't tell you anything about it? That he had no authority? That he would have to take it up with the home office and see if he couldn't induce them to permit him to take them back, or words to that effect?

A. I don't recall that.

Q. Did he say anything to you on that subject at that time?

A. He has at various times.

Q. He has told you that he would have to take it up with the home office, at various times? Is that right?

A. Certain things."

. . . . . .

"Q. But when you wanted to return tires out of stock, then Mr. Fitzgerald said to you that he would have to take it up with the home office, and suggested that he would do his very best to have them make favorable adjustment with you, is that right?

A. Not at the time that we agreed in San Francisco on the return of the stock; he didn't say anything about that.

Q. But at other times he did?

A. It is possible he did.

Q. So that you knew to some extent, at any rate, that his authority to make agreements with you was not complete, that it was limited, that he did have to ask authority or consent from the home office?

A. Well, the same as any other coast manager, I presume.

Q. I am going to ask you to answer that question. (Question read.)

A. I would presume that he would have to take up matters of importance with his home office, yes, if it was a matter of importance."

Sherrill's testimony (p. 238):

"Q. Of course Mr. Fitzgerald was very kindly disposed towards your firm during all the time yo udid business together, wasn't he?

A. I think he was, yes, sir.

the time you did business together, wasn't he? was frequently trying to get the factory to make concessions for you and do things for you that he couldn't do himself?

A. We expected him to help us out wherever he could.

Q. And whenever a situation arose where you needed some assistance which you were not

actually entitled to, you looked for Fitzgerald to go to the bat for you, as one of your letters indicates?

A. We expected him to help us out whenever he could.

Q. And Mr. Fitzgerald did frequently urge his house to make you concessions, didn't he?

A. I presume that he interceded for us at times.

Q. You know he did, don't you? You say presumed. You know that to be a fact, don't you?

A. In certain cases, yes.

Munnell's cross-examination (pp. 426-427):

"Q. Mr. Munnell, you frequently made requests of Mr. Fitzgerald to take up with the factory various allowances to be made, credits, return of merchandise, extensions and such things, didn't you?

A. I think we did, yes.

Q. And on each occasion when you took that matter up, didn't he tell you that he would have to refer that matter to the company for their determination?

A. No, he didn't, not in each instance.

Q. Did he make that observation to you on some occasions?

A. Some occasions he did, yes.

Q. And did he tell you that he was not in position to consent to any such arrangement without approval of the home office at Akron, the factory?

A. We might have asked him some things he didn't have authority to settle. In most of the cases he had the authority, at least he made the settlement.

Q. Among the things that he told you he couldn't arrange for without the approval of the company, was the matter of return of merchandise, didn't he?

A. He accepted return of part of it without taking it up with the factory.

Q. During 1920 you had requested from him permission to return merchandise, hadn't you?

A. Yes.

Q. And didn't he tell you then in conversation, and also write you, that such matters were out of his jurisdiction, that he would refer it and take it up with the house for you?

A. I think he did in some instances, yes.

Q. Was that matter—

A. He agreed to take some merchandise that wasn't in controversy at all."

. . . . . .

(p. 428.)

"Q. At any rate, later you did find that in the matter of returning merchandise he had to get instructions from Akron?

A. There were a number of times when he hesitated without getting some special instructions."

. . . . . .

Q. Didn't he in that respect tell you that he had to communicate with the house, and that he would use his—the language in one of his letters, he would "go to the bat for you," to see what he could do?

A. That is in the correspondence all right, yes.

Q. You knew that. Now then in another instance that you had knowledge of, with respect to inducing the company to accept Liberty Bonds—you wanted Fitzgerald to induce them to do that, didn't you?

A. I don't think we wanted him to induce them to, we tried pretty hard to get rid of our Liberty Bonds to them, yes.

Q. Well then you wrote Mr. Fitzgerald about it?

A. Practically all of our correspondence started at the San Francisco office.

Q. And then didn't he tell you that that was beyond his scope, and that he would have to take it up with the home office?

A. I think he did, yes.

(p. 431.)

"A. . . . He came here and offered wire from the factory showing they told him to let us return some tires and take notes for the balance. We didn't know what his instructions were here."

I. H. PECK, a witness called by the plaintiff, testified that he was present at a conversation be-

tween Sherrill and Cassidy after this action was commenced, and in this conversation Sherrill said to Cassidy (p. 466):

> "A. We were visiting along, and the question of this trial came up, and Mr. Sherrill said, 'I have always liked Mr. Fitzgerald very much, and if this case comes to court I will have to bring up matters which will put Mr. Fitzgerald in a bad light with the Mohawk factory, which he represents, because Mr. Fitzgerald has made special agreements with me which I am satisfied were not known by the factory.'"

Neither Sherrill or Cassidy contradicted this testimony. This statement indicates that Sherrill knew that he was claiming an agreement with Fitzgerald which Fitzgerald had no authority to make.

We respectfully invite the attention of the court to the following cases that present situations like the case at bar.

In Wentworth v. Winton Co., 95 Ore. 541, plaintiff's assignor was the Portland distributor of automobiles manufactured by defendant, an Eastern corporation. Difficulties arose in their accounts and defendant sent one Miller, its **"manager of the factory branch at Seattle, Wash.,"** to negotiate a settlement of the differences between the parties. On **November 30, 1912,** in the course of the negotiations for a settlement, Miller wrote plaintiff's assignor a letter in which he said:

"Confirming a talk I had with your Mr. Ettinger regarding what the writer, personally, would be willing to do, which talk or action must be verified by our home office at Cleveland.

I would state that it would be satisfactory to assume the lease on the building you now occupy, known as the Winton Bldg., with the understanding that the rent of this building is $300 per month, with the privilege of subleasing any part of the rooms now occupied by other tenants."

. . . . . .

"It is distinctly understood that this is not a proposition; it is only a line of suggestion for you either to accept or reject and for me to take up with the home office."

In February, 1913, a written contract was closed upon the terms outlined in Miller's letter.

Plaintiff's assignor claimed, however, that at the time it made the agreement with Miller, that Miller also agreed to pay the rent which was in arrears up to the time that the agreement was made, as a part of his contract of settlement, and in passing upon the question as to the right of Miller to bind defendant by such an agreement, the Supreme Court of Oregon held:

"1, 2. Thus it is seen that, while the Oregon company was dealing with Miller as a known agent of the Winton Company, nevertheless the

Oregon company was **in no position to assume that Miller's agency was general, because the Oregon company had information to the contrary:** Leavitt & Co. v. Dimmick, 86 Ore. 278, 288 (168 Pac. 293); Hillyard v. Hewitt, 61 Ore. 58, 62 (120 Pac. 750); Aerne v. Gostlow, 60 Ore. 113, 121 (118 Pac. 277). Miller had authority to negotiate for the Winton Company, but he was without authority to bind it. The Oregon company was **told by Miller** in express words by the letter of **November 30th, that he had no authority,** except to negotiate; and the fact that the written contract, after having been signed by the Oregon company, was delivered to Miller to be forwarded to Cleveland, Ohio, there to be signed by the officers of the defendants, was of itself an indisputable acknowledgment of Miller's lack of authority to bind the Winton Company."

The same condition exists in the case at bar. Fitzgerald occupied the same position as the agent in the case cited. Fitzgerald wrote defendants calling attention to his lack of authority, just as Miller did in that case. We call special attention to the letter of November 10, 1920, (Plaintiff's Exhibit KK, p. 188) in which he uses language substantially like the language in the case cited. In that case the court said:

"The Oregon company was told by Miller in express words by the letter of November 30,

that he had no authority except to negotiate." tiate."

And in the case at bar **Fitzgerald told defendants not once** but many times that he had no authority to accede to the several demands that they had made, among them demands for leave to return merchandise and demands for credits, for he said to them:

> "We have told you that the matter of your returning stock for credit, that is to offset your debits, is entirely up to the credit department at Akron and we believe they have written you on that subject.
>
> You must not forget that the writer's authority with this company is limited to certain matters, such as the selling of goods, territorial arrangements and etc., but when it comes to credits, return of unsold merchandise and things of that caliber, then you are dealing with our credit department, because after we have made a sale of goods, then the matter passes out of our hands into those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department." (Plaintiff's Exhibit KK, p. 188.)

The determination in the case cited turned upon the proposition that the party dealing with the agent **knew** of the agent's limited authority through the agent's own communication to him. That is precisely the proposition involved in the case at bar, and the record clearly shows that defendants knew of Fitzgerald's lack of authority. We submit

that the foregoing decision, if not controlling, is entitled to great weight in determining the question involved in this case, as representing the law of the State of Oregon on the particular subject under consideration, the State in which the alleged agreements were made.

In Leavitt v. Dimmick, 86 Ore. 278, a contract was negotiated by one Scarlett, also a "branch manager," and it was claimed that he had made an agreement which his principal claimed was beyond the scope of his authority to make. The only evidence in the record as to knowledge on the part of the defendant as to the limitation of the "branch manager's" authority consisted of a statement in a contract which had been entered into between plaintiff and defendant two or three years prior to the time that the agreement in controversy was made. This earlier contract contained a clause providing that it should not be considered in force until approved and signed by the vice-president. The Supreme Court of Oregon, speaking through Chief Justice McBride, said:

> "The alleged oral agreement was not within the actual or apparent power of the agent to execute. Defendant had been doing business as plaintiff's sales agent in 1912, and the agreement for that year contained a clause, providing that it should not be considered in force until approved by the vice-president, and another clause which provided that its acceptance

should be evidenced by the signature of plaintiff's vice president. It will thus be seen that defendant had full notice of the extent of the agent's powers; and, if with this notice he chose to rely upon a 'gentleman's agreement' with the agent, he did so at his peril. It is said in Hillyard v. Hewitt, supra:

'Parties dealing with an admitted agent of another have a right to assume, in **the absence of anything indicating a contrary state of affairs, that his agency is general.'** Aerne v. Gostlow, 60 Ore. 113, 118 Pac. 277.

In the case at bar everything indicated a **'contrary state of affairs.'** Every contract which the defendant signed was notice to him that the agent's authority was limited, and with such notice it was defendant's duty to inquire and ascertain the extent of the agent's authority before acting upon the alleged oral contract."

We submit that the case cited is particularly applicable to the case at bar, for in that case the court held that the party dealing with the agent, having notice of the branch manager's limitation of authority, could not "rely upon a gentleman's agreement with the agent," and if he did so it was at his peril. In the case at bar all of the correspondence indicates a "contrary state of affairs," which precludes any assumption that Fitzgerald had a general agency.

In denying plaintiff's motion for a directed verdict the court observed:

> "I think his authority is a question for the jury. Mr. Fitzgerald testified that he had authority to make any contract that he did make."

We submit that even if Fitzgerald had so testified, that this testimony would not be binding on the plaintiff, **for his own** statement that he had authority is a statement of a bare conclusion of law and an assumption of authority, and if his authority was in fact limited and defendants knew of the limitation, his assumption of authority would not be binding upon the plaintiff.

In Aetna Indemnity Co. v. Ladd, 135 Fed. 636, 644, (Ninth Circuit), this court held:

> "It was proper for the witness to testify in what capacity he was acting in obtaining this money, for whom he acted when he borrowed it, and his understanding of the relation he bore to the transaction. **His statement could not bind the plaintiff in error,** nor prejudice his rights."

In Keane v. Pittsburg Lead Mining Company, 105 Pac. 60, 64, the agent was asked:

> "Q. You had full authority to make that agreement in escrow from Mr. Keane?"

The court held:

> "This question was clearly erroneous. It was not what the witness' opinion may have

been as to what his authority was that determined his authority, but such authority must be determined from the facts."

Upon the foregoing authorities it is clear that **Fitzgeralds's own statement** as to his authority could not bind the plaintiff if the evidence established that he did not possess such authority and defendants had knowledge of the limitation.

But the record discloses that Fitzgerald's testimony that he "had authority to make any contract that he did make" must be read together with the testimony that he had obtained **express** authority to make those agreements, so that when he spoke of having the authority it was **based upon the receipt of express** authority in each instance.

His agreement to take back $6000.00 worth of merchandise and notes to settle the account in November, 1920, was upon **express authorization as to that transaction** (pp. 53-54). He testified:

"Q. Now you had authority from the factory to take those tires back, didn't you? (referring to the $6500.00 worth included in the November, 1920, settlement.)

A. Yes, sir.

Q. Did you get authority from the factory in reference to this transaction?

A. On this particular transaction of $6000.00?

Q. Yes.

A. Yes, sir.

Q. It wasn't necessary, was it?

A. Yes, sir.

Q. Wherein was it necessary?

A. **Because I hadn't authority to allow anybody to return goods.**

Q. **You haven't any authority?**

A. **No, my authority is limited, simply selling; that is my authority, to sell goods.**

Q. You are the Pacific Coast Manager?

A. I am.

Q. You handle the entire Pacific Coast on behalf of the Mohawk Rubber Company?

A. **The selling end.**

This testimony illustrates that the court's assumption, as to Fitzgerald's testimony, was not in accordance with the testimony as given.

The cross-examination of Fitzgerald, when taken as a whole, shows that when he testified that he had authority to make the agreements that he had made, that **he referred to those agreements which he admitted that he had, in fact, made.** But it will be remembered that he **denied** emphatically **having made an agreement for price protection** or an **agreement for the return of merchandise** or for the cancellation of a note, so that the statement that he had authority to make the contracts that he did make is only **co-extensive** with his statement as to the agreements he admitted having made. In other words, when he said he had authority to make the agreements that he did make, he referred to those agreements which he admitted having made, and not to agreements which he denied having made.

With respect to agreements for rebates, cancellation of notes, return of merchandise he emphatically denied having made those agreements and emphatically denied the authority to make them. This is illustrated by the testimony, of which the following is a fair illustration:

> "Now **I had no authority** to tell Munnell & Sherrill, or **neither did I tell them,** that when they gave me those notes, or sent these notes in to our factory, that these goods would just automatically revert in their purchase, don't you see, on the Spring dating terms. I didn't tell them that. I couldn't have told them that." (Page 495.)

At page 502 he testifies:

> "Q. You say you didn't have any right or any power back there in December, to make an agreement to guarantee Munnell & Sherrill against a price decline?
>
> A. **I have not.**"

This and a great deal of additional testimony in the record of like character shows that Fitzgerald did not admit that he had authority to make agreements for rebates, concellation of notes and return of merchandise, and the observation of the court in denying the motion for a directed verdict was not supported by the record.

We submit that Fitzgerald's **testimony must be taken as a whole** and the effect gathered therefrom. We cannot cull from the record a single statement and disregard the qualifying statements.

At pages 503 to 505 he testifies with respect to **two specific instances** in which he made agreements for price protection, one in Seattle and one in Spokane, but the evidence shows that in each instance he had **specific telegraphic instruction** to make the agreement. Moreover, these agreements were upon **merchandise purchased** by these people **at the time the agreement was made.** The price protection was **not upon old stocks** of merchandise, as claimed in this case.

He was asked (page 504):

> "You had the same authority when you made this settlement you had on that of Munnell & Sherrall, didn't you?
>
> A. **I did not.**"

With respect to the Seattle and Spokane instances, he testifies (pages 504-505):

> "I **wired my company for permission** to give these people that particular protection on that particular order, and they got it."

We submit that in order to hold plaintiff liable on the contracts made with Fitzgerald, as set up in their answer, that they had to establish the same character of express authority as existed in the Seattle and Spokane instances.

Sherrill testified (page 116) that he negotiated the arrangements for representation of the company first with Cowen, then with Fitzgerald, but nevertheless, **he requested contracts from Mr. Mason**, plaintiff's president, and received them, indi-

cating that he did not recognize Fitzgerald's authority to make a binding contract, but recognized him for the purpose of negotiating, merely. In this respect the case comes squarely within the decision in Leavitt v. Dimmick, 86 Ore. 278, where the court held that such an incident charged the person dealing with the agent with notice of the limitation of the agent's authority, and precluded the person dealing with the agent from relying upon anything except express authority.

We respectfully submit that the evidence referred to, documentary as well as the oral, given by Fitzgerald, Mason, and Munnell and Sherrill, is of such a character that defendants can no more say that they did not know of the limitation of Fitzgerald's authority than a man can say that he did not see an approaching train while looking in the direction from which it came with nothing to obstruct his view.

The record establishes that defendants had knowledge of the limitation of Fitzgerald's authority and there is no evidence in the record tending to establish the contrary, hence no issue was presented in that respect. Under the view of the law as adopted by the court, defendants could not recover on **implied or apparent** authority if they had knowledge of the limitation, and since there was no proof of any **express** authority, the motion for a directed verdict should have been granted, and the verdict rendered is not supported by the evidence.

II.

None of the affirmative defenses or denials in defendants' answer present any issue as to the quality or character of the merchandise sold by plaintiff to defendants which would permit the introduction of evidence to the effect that the merchandise sold by plaintiff to defendants was of defective quality and that defendants sustained loss by reason thereof; nor is any issue presented by the pleadings upon which any such evidence would be relevant. The defenses are merely claims for credits based upon agreements alleged to have been made by defendants with plaintiff's agent. These agreements, however, did not in any way involve the question of the quality of the merchandise.

Nevertheless, in the opening statement to the jury, defendants' counsel stated to the jury at great length:

> "That the defendants would establish that the plaintiff delivered to the defendants tires that were of **defective** and **inferior material** and **unsalable**; that the defendants had resold some of the tires and tubes to their customers and the said **customers returned the said merchandise because of the defective and inferior condition** and refused to pay defendants therefor, and that as a result thereof, the **defendants suffered loss of a great deal of trade and loss of profits from the said sale and that this condition caused defendants considerable financial embarrassment and difficulty.**"
>
> (Bill of Exceptions, p. 37.)

Plaintiff objected to the statement on the ground that the pleadings did not present any issue as to the quality and character of the merchandise, and that evidence in support of the statement of counsel to the jury would be immaterial. (Bill of Exceptions, p. 38.) The trial court, however, stated, "Let him state his case." Plaintiff thereupon saved an exception to the statement and ruling. (Bill of Exceptions, p. 38.)

Notwithstanding the fact that no issue was presented by the pleadings under which the quality of merchandise would be presented, defendants' counsel for the SECOND time brought the same matter to the attention of the jury during the direct examination of the defendant Sherrill. Referring to a letter, counsel asked the witness:

> "Q. This is his letter about the **quality be-in maintained,** what is the fact about that?
>
> Mr. BISCHOFF: Objected to; no issue raised in the pleadings about any defect in the quality.
>
> Mr. LILJEQVIST: It may become material later on.
>
> COURT: Nothing in the pleadings about the **quality** of the tires." (Trans. p. 75.)

This objection and ruling of the court brought to the attention of defendants' counsel the attitude of the court in reference to defendants' attempt to inject into the case any reference to the quality and character of the merchandise, and defendants' counsel was bound to know and did know at that point

that no such evidence would be permitted by the court. Indeed, counsel for defendant was bound to know without objection of plaintiff and ruling by the court that such evidence would not be admissible under the pleadings, but after the ruling of the court at that point there certainly could be no justification or excuse for again bringing to the attention of the jury the same objectionable matter.

Nevertheless defendants' counsel for the THIRD time brought this matter to the attention of the jury during Sherrill's examination in the following manner:

> "Q. Just right here, before you go any further. What is the fact at that time as to whether **your dealers had returned stock to you** and **whether your dealers refused to do any business with you with reference to the Mohawk line?**
>
> COURT: I don't think that is important in this case; unless coupled up with some agreement it would not be important.
>
> Mr. LILJEQVIST: One reason why they were willing to surrender the line.
>
> COURT: It doesn't make any difference why they were willing to surrender, the question is whether they did surrender." (Trans. pp. 90-91.)

The question referred to above was highly improper for two reasons: FIRST, because it was put in the face of the former ruling of the court, and SECOND, because the question was purposely

put in a leading form incorporating into the question the very information which counsel was bound to know and did know the court would not permit the witness to give to the jury, and hence we find counsel conveying to the jury information that dealers had returned merchandise and had refused to do any business with defendants. The purpose of this question becomes apparent when considered in the light of the preceding attempts to bring the same subject to the attention of the jury.

Defendants' counsel brought to the attention of the jury the same subject for the FOURTH time during the examination of Mr. Miles, one of the defendants' customers, as follows:

> "Q. How long did you handle the Mohawk line?
>
> Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. I don't see what his arrangement has to do with it.
>
> Mr. LILJEQVIST: They have offered a lot of letters here that they have introduced, talking about the arrangements, attempting to show that Munnell & Sherrill got into financial slowness in payment of certain bills. They have offered a lot of evidence about the Clark & Miles account, themselves. Now, that being true, they have brought out that transaction. They are apparently attempting to show that the Mohawk Company in this case were very philanthropic towards Munnell & Sherrill in carrying their account from a certain period to

a certain period; that due to the kindness of this company in failing to press the payment of certain notes, things went wrong. That is kind of the impression that you gather from that, in reference to the Clark & Miles transaction that they brought out, the $10,000 deal that they brought out, and these letters in reference to it, and different things which they ask to have the jury believe that we were in the wrong and they in the right. **We wish to show that when we took this line we naturally relied upon the fact that these were good, and we unfortunately happened to get at the time these tires were not good. We are not saying anything against the Mohawk line at present because they did change their line about that time.**

Mr. BISCHOFF: I object to a volunteered statement of that kind. There is nothing in the evidence to support it.

COURT: I don't think either of you have much effect on the jury on statements made outside of the record. The jury will decide this case on the evidence.

Mr. LILJEQVIST: We offer to show by this witness that this $10,000 lot which he bought from Munnell & Sherrill which has been referred to—**the reason he wasn't able to sell this line was because the tires didn't stand up to the guaranty. People to whom he sold them returned them to him, claiming they were no**

good. He was losing customers, and he returned the stocks to him and had a lot of difficulty over these tires. This man was one of the biggest dealers in the state of Oregon handling these tires.

COURT: What has that to do with this case?

Mr. LILJEQVIST: I want to meet what they brought out.

COURT: The case is to be tried on the issues made here, and written contract between defendant and plaintiff, whether entitled to a rebate, or whether entitled to credit for the return of the tires.

Mr. LILJEQVIST: But if they seek to draw the inference from this state of facts, that we were in default, we wish to show the default was not our fault, because we couldn't sell the tires on account of the quality being bad.

COURT: As I understand the pleadings, there is no question of defects. They haven't set up any defense that the tires were not up to standard, or that you lost money on it on account of defective tires.

Mr. LILJEQVIST: I wish to show by this witness and ten other witnesses—to prove defective tires.

COURT: Prove something wholly outside of the issues in the case.

Mr. LILJEQVIST: To meet the testimony they have offered.

COURT: They haven't offered testimony to that effect. I think we will confine the investigation to the issues in the case, and not go outside.

Exception saved.

Mr. BISCHOFF: I want to assign as misconduct the remarks of counsel upon questions not presented by the issues, entirely foreign, and made for the purpose of reaching the jury on an extraneous matter.

COURT: You have your exception.

Mr. BISCHOFF: I want to assign as misconduct in referring to questions of that kind wherein he went outside of the record entirely.

COURT: I don't think counsel on either side should make that kind of a record of that kind of a statement. Counsel was probably mistaken in the view the Court has of the issues in the case." (Trans. pp. 269-272.)

If the court will for a moment reexamine the question which brought out this long speech and argument on the part of defendants' counsel it will at once be apparent that there was nothing in the question, or plaintiff's objection thereto, which furnished any excuse or justification for the verbose statement that followed, nor for entering into a long discussion as to the quality of the tires. Counsel took the occasion at that time without any justification therefor, and in face of the repeated rulings of the court, to argue to the jury, by means of this argument on the objection to the question, the

very information which counsel then knew beyond question the court would not permit to go to the jury. The misconduct at that time had become so flagrant and the intention of counsel to bring the same subject to the attention of the jury had become so pronounced, that plaintiff's counsel had to take the precaution to spread upon the record notice that this practice would be regarded as misconduct. The discussion speaks for itself and its purpose must be manifest from a bare reading of the statement.

Defendants' counsel brought the same subject to the attention of the jury for the FIFTH time (Trans. pp. 299-300) where the following took place:

> "Q. (Mr. LILJEQVIST) Do you know what the **trouble** was as explained in this letter to them, and will you say whether you ever took this up with the factory?
>
> A. Yes.
>
> Mr. BISCHOFF: I don't see the materiality of Clarke & Miles, the complaint they were not able to use them. I don't see that has reference to any issue here.
>
> COURT: I don't think it has any materiality here; it occurred long prior to this settlement.
>
> Q. Those letters you wrote to them in reference to having tires on hand and which are referred to, **where they note the condition,** will you state without going into detail just what the situation was? **Just what the reason was you had accumulated this stock of tires?**

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial, occurring long purior to the settlement of December 2, 1920, and the condition couldn't possibly affect the issues raised by the pleadings.

COURT: What do you claim for it?

Mr. LILJEQVIST: The correspondence, the course of correspondence—

COURT: I don't see what the correspondence has to do with this case prior to the settlement in 1920 when the notes were given." (Trans. pp. 299-300.)

Here again we have a thinly veiled attempt to bring the matter of defective condition of tires to the attention of the jury, and we find counsel again incorporating the information in the questions, knowing that the court would not permit such evidence to be introduced. Thus we find him injecting into his question such statements as "Do you know what the trouble was?" and "Where they note the condition," both of which were intended and did carry to the jury the same information that defendants' counsel had so persistently brought to its attention.

Defendants' counsel brought the same subject to the attention of the jury for the SIXTH time when he offered in evidence the letter of December 31st, 1920, which necessitated interposing an objection, bringing to the attention of the jury the same subject. (Trans. p. 309.)

The same subject was referred to for the SEVENTH time (Trans. pp. 406-409) during the examination of Mr. Munnell, at which time defendants' counsel again took occasion to enter into a long speech on the subject of the quality of the tires, as follows:

> "Q. You said you had on hand. Will you state approximately how much of that was stock that came back to you, which you were unable to turn over in these two orders that have been referred to, the $10,000 one to the tire company here in Portland, and the other $10,000 worth to Miles & Clark of The Dalles?
>
> Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial; nothing whatever to do with any issue raised in the pleadings.
>
> Mr. LILJEQVIST: I have a further point I want to present to the court in reference to this. They are disputing that they had any agreement with us to cover our rebate on these tires we kept in December when we gave the notes. They are denying it, we affirm it. That is a question for the jury to decide. Now it seems to me that if the fact should have been that we bought a lot of tires from them upon a guarantee of quality and a guarantee of price, and the guaranty of what these tires would do —we invested nearly $30,000 in these tires,— and they didn't conform, we would have had,

beyond any question, a cause of action, in my judgment, in reference to the quality of the goods sold, in such a state of facts.

Mr. BISCHOFF: Why didn't you—

Mr. LILJEQVIST: Hold on. That being true, when they came up here—certainly if there was a lot of trouble with the tires in reference to quality, etc., if we were unable to sell $20,000 worth of that stock we would have sold if the tires had been right, it is certainly competent evidence upon the proposition if this company were under a moral obligation, let alone a legal obligation, at the time we made this agreement with them to give them the notes, and they should give us the benefit of the price decline. In other words, the situation between the parties, they are attempting to claim they had no authority to make such an agreement, and didn't make such an agreement. Here we had the stock, a lot of tires which, if they hadn't come through according to their guaranty of quality, etc., we would have the situation in which we would have a legal remedy if we couldn't settle and we did settle on a proposition to give the notes, and they agreed with us that we would get the price later on, and get it and sell stuff if we were able to sell it, and on such stock as we should keep, we should have the benefit of the price decline later on. It seems to me simply one of the elements of fact. I don't see why we should

plead it. I don't expect to go into calling witnesses, since the ruling of the court, but it seems to me, now they are disputing any agreement of that kind, the situation of the parties at that time—we would certainly have the right to go into the situation of that kind if they make that attempt, and we had proof they had notice of it. In other words, it is all corroborative evidence. I don't want to take much time. I suggest that we can show that with much less trouble, and very briefly show our contention. I want to go into it and just show our contention.

COURT: Do you claim you had any such conversation with Mr. Fitzgerald?

Mr. LILJEQVIST: Our correspondence all shows.

COURT: At the time you claim the contract was made?

Mr. LILJEQVIST: We claim we made that contract. We didn't threaten to sue them.

COURT: As a part of the conversation with Fitzgerald, the quality of the tires was discussed?

Mr. LILJEQVIST: Whether it was discussed at that conversation or not, it was discussed. Letters had been written about it. One of the circumstances existing at the time of the settlement.

COURT: As I understand the pleadings,

there is simply three questions shown to be in dispute. A difference of $137.32 rebate on the tires in November, 1921. You claim you are entitled to $249 and the plaintiff gave you credit for $111.68. That question is in dispute. The next question is the alleged agreement in June, 1921, by which the plaintiff agreed to settle a controversy or dispute you were having about the decline in prices, by cancelling one of the notes. And a third is the credit which you are entitled to, if any, for tires turned over to the American Tire & Rubber Company. Those are the three issues in the case, and I think the evidence should be directed to that.

Mr. BISCHOFF: I want to state in the record that I again assign as misconduct the lengthy statement of counsel with respect to defects in tires, made for the purpose of creating a prejudicial atmosphere. The matter has been ruled on on two or three occasions before. Counsel knew the ruling of the court, and his remarks I regard as having been made for that special purpose.

From the tenor of this outpouring it must be quite apparent that counsel was directing his remarks to the jury rather than to the court, for he knew by that time that such argument would not be pertinent in support of the question which was objected to, that the court would not reverse the ruling which it had previously made whenever the same subject was referred to.

The same subject was brought to the attention of the jury for the EIGHTH time at the conclusion of Munnell's examination, when the following took place (Trans. p. 446);

> "Q. One question. I want to ask, during this time you were having this trouble with this old account, I want you to state to the jury what is the fact with reference to whether you lost all the dealers that you had—whether you were able to retain them or not?
>
> Mr. BISCHOFF: That is objected to, may it please the court.
>
> COURT: What has that to do with the case? The court has repeatedly stated there is no issue in this case except what is set out in the answer. Confine your testimony to that. The issues are perfectly simple as far as the answer is concerned, and that is the issue we are to try."

It must be apparent that the **repeated efforts** to bring to the attention of the jury the subject of defective quality of tires and that defendants suffered loss by reason thereof, was bound to be prejudicial to the plaintiff. It is true that the **plaintiff's objection was sustained** in each instance and that on one or two occasions the court made the statement that such statements would be disregarded by the jury, but it is well known and **recognized** by courts that the effect of such repeated references are bound to and do have a prejudicial effect. **Experience has taught and the courts have recognized that jurors**

are incapable of freeing their minds from prejudicial references made during the course of the trial, and that they are bound to influence the determinations, even in cases where the trial court has specifically directed the jury to disregard such testimony. The information that tires were defective and that defendants suffered loss by reason thereof was **calculated to and bound to produce** a feeling of sympathy for the defendants and of prejudice against the plaintiffs, which no amount of caution on the part of the trial court could dispel.

We charge that this **information was deliberately brought to the attention of the jury,** and there can be no other conclusion to be drawn from the course of conduct pursued by defendants' counsel. There is not the slightest excuse in the record for the reference to these matters. The **pleadings** are so **barren** of any reference to these matters that it **can not be said that counsel has mistaken the scope of the issues.** While the first and second references might have been excused, overlooked, or minimized on one ground or another, there certainly could be **no excuse for the repetition** or the lengthy arguments indulged in by the defendants' counsel **after the court had ruled** on the matter adversely on a number of occasions. After that situation, the subsequent attempts to bring this matter to the attention of the jury must be regarded as having been willfully and deliberately made for the purpose of influencing the jury. The necessity for the repeated objections and the rulings of the court thereon only

served to emphasize the matter, and the layman sitting as a juror was bound to form the conclusion that a situation in fact existed which the plaintiff was exceedingly anxious to have withheld from the knowledge of the jury, which if disclosed would be detrimental to plaintiff. As was said in Chicago City R. R. Co. v. Gregory, 6 A. & E. Ann. Cas. 221-223, 221 Ill. 591:

> "The question here is whether a party will be permitted by **indirect means** to acquaint a jury with facts which he is not allowed to bring to their attention by direct proof.
>
> In Scripps v. Reilly, 38 Mich. 10, the Supreme Court of Michigan, in holding that **repeated offers of proof of incompetent matter** might be cause for reversal, said:
>
> 'Everything having a tendency to prejudice or influence a jury in their deliberations which is not lawfully admissible in evidence on the trial of the cause should be, so far as possible, kept from coming to their knowledge during the trial. **An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him** when he retires to deliberate upon the verdict to be given, and no matter how honest or conscientious he may be or how carefully (599) he may have been instructed by the court to not permit such incompetent matter to influence him or to have any bearing in the case, it will be difficult, if not impossible, for him to separate the competent

from the incompetent, or to show to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. But whatever the reason for the rule may be, all courts agree in excluding incompetent testimony, and that an error in this respect will be sufficient cause for reversal. This rule would be but slight protection if counsel or witness could be permitted to make a statement, but not under oath, of the incompetent testimony, or counsel state same fully to the jury, in their argument or otherwise. The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the method adopted in communicating the fact. No matter how the information is obtained, the result is the same.' "

The cases in which such conduct has been discussed and condemned are numerous. The following case is typical of the manner in which the courts deal with this subject.

In Louisville R. R. Co. v. Payne, 19 A. & E. Ann. Cas. 294, 133 Ky. 539, the court held:

"The misconduct of counsel complained of in this case was the **repeated asking of incompetent questions** over the objection of counsel for defendant, and **in the face of the rulings of the court that such questions were incompetent.** Counsel for plaintiff attempted to establish that

the servants in charge of defendant's trains on other occasions had been guilty of acts of negligence similar in character to that for which a recovery was sought in this case. This the court held to be incompetent; but, in spite of his ruling to this effect, counsel for plaintiff persisted in pursuing this line of interrogation almost to the point of exasperation. To each new question bearing upon the same subject counsel for defendant would object, and the objection was promptly sustained and an exception taken, and the question immediately asked in another form with the same result. These questions were incompetent, and the line of interrogation attempted to be pursued wholly improper; and, when the trial court had so decided and ruled, counsel for plaintiff should have desisted in his efforts to bring the matter before the jury. Of course a large discretion is allowed an attorney in presenting his case, and so long as it does not appear that he is knowingly and intentionally violating the rules of practice in the introduction of evidence, or otherwise, the fact that he does (544) so will furnish no ground of complaint to opposing counsel, where the error is corrected by the court; but in a case like that here presented, where counsel persistently pursues a line of interrogation which the court rules to be wrong, and which one reasonably well acquainted with the rules governing the admission of evidence must know to be im-

proper, the **conclusion is irresistible that it is done for the purpose of influencing and prejudicing the mind of the jury in arriving at a verdict.** No court should contenance such conduct; and when the trial judge, because of his kindness of heart, or long-suffering and forbearing nature, permits it to go unpunished, there remains nothing to do but deprive the one offending of the fruits of his victory thus earned. **This case must be reversed for other reasons; but if there were none such, this misconduct upon the part of plaintiff's counsel would furnish abundant grounds for reversal.**

Where the record shows that an attorney persistently and dogmatically pursues a line of interrogation over the objection of opposing counsel and the adverse ruling of the court to the extent here shown, the conclusion is irresistible that such was not due to error of judgment, but in pursuance of a determination to present the matters about which the questions are asked to the jury in spite of court and counsel. Such conduct should neither be tolerated nor excused by the trial court, and no litigant should be permitted to profit by such practice.

In the case of Louisville, etc. R. Co. v. Reaume, 128 Ky. 90, 107 S.W. 290, it was expressly held to be a reversible error to repeatedly and persistently ask incompetent questions. And in the case of Marcum v. Hargis, 104 S.W. 693, 31 Ky. L. Rep. 1117, this court

held that, where a line of questions had been ruled to be incompetent, the trial court did not err in requiring counsel, before he would permit the question to be asked, to first submit it to him, not in the hearing of the jury, in order that he might determine its competency before he would permit it to be asked. The reason for the rule is apparent. Where an incompetent question is asked, opposing counsel must either permit it to be answered or enter his objection; and although the trial court refuses to permit the question to be answered, the very fact that the same question in a different form is repeatedly asked, and a vigorous objection interposed to its answer, emphasizes its importance in the minds of the jury, and necessarily prejudices the case, and for **this reason, if for no other,** where this practice is pursued to the extent indicated in the record in this case, the judgment should be reversed."

In Cleveland R. R. Co. v. Pritschaw, 100 A. S. R. 682-687, 69 Ohio St. 438, the court held:

"The repetition of incompetent inquiries, to which objection had been sustained, was for the obvious purpose of **eliciting a repetition of the objection** and to prejudice the case in the estimation of the jury. It should need no comment to show that the purpose which prompted such conduct called for its complete and immediate suppression."

In People v. Derbert, 71 Pac. 464, in reversing a verdict of guilty in a criminal case, the court held:

> "The court promptly sustained objections to all these questions, but that did not cure the error. It clearly appears that the object of the district attorney was to leave the impression upon the mind of the jury that defendant had committed other crimes, and that he had changed his name. His questions were directly in face of the rulings of the court, and certainly, with the knowledge that the court would not permit them to be answered. The object was to ask the questions and not to get the answers."

In Chicago R. R. Co. v. Mines, 77 N.E. 898, the court held:

> "The action of counsel in conveying to the jury, by **suggestive interrogatories,** the very information which the court had held the jury should not have, was improper."

The entire subject of misconduct of counsel is dealt with at length in the exhaustive notes to be found in 6 A. & E. Ann. Cas. 224; 19 A. & E. Ann. Cas. 296; Ann. Cas. 1917 A, 441. And it seems to be well established that a new trial must be granted for misconduct of the character presented by the record in this case.

In a California case referred to in the notes, People v. Mullings, 23 Pac. 229, 83 Cal. 38, the court said:

"To say that such a course would not be prejudicial to defendants is to ignore human experience and the dictates of common sense."

We respectfully submit that the conduct of the defendants' counsel is subject to the criticism made in all of the cases referred to, for he brought up the subject when there was no issue in the pleadings and then persisted in bringing the matter to the attention of the jury on numerous occasions after the court had held that such testimony was inadmissible, and even after plaintiff's counsel gave notice upon the record that the attempts were regarded as misconduct. It cannot be said in this case that this repeated reference to the defective quality of the merchandise and that defendants suffered injury therefrom, did not have its effect upon the minds of the jurors, especially in view of the fact that the jury did not even award plaintiff the amount which the pleadings admitted was due to plaintiff.

Plaintiff made a motion for a new trial on the ground of this misconduct, and the refusal to grant the new trial is assigned as error (Assignments of Error, p. 546.)

III.

If this court adopts the view that a verdict should have been directed because there was no proof of express authority on the part of Fitzgerald to bind the plaintiff by such agreements as are set forth in defendants' answer, then the judg-

ment should be reversed, with directions to enter judgment for the plaintiff.

Respectfully submitted,

BEACH & SIMON and
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Attorneys for Plaintiff in Error.